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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of: )  
 )  
Amendment of Parts 1, 2, 22, 24, 27, ) WT Docket No. 10-4  
90 and 95 of the Commission's Rules )  
to Improve Wireless Coverage Through )  
the Use of Signal Boosters )

To: The Commission

**REPLY COMMENTS OF WILSON ELECTRONICS, INC.**

Russell D. Lukas  
LUKAS, NACE, GUTIERREZ & SACHS, LLP  
8300 Greensboro Drive, Suite 1200  
McLean, Virginia 22102  
(702) 584-8678  
[rlukas@fcclaw.com](mailto:rlukas@fcclaw.com)

*Attorney for Wilson Electronics, Inc.*

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Wilson Electronics, Inc. ("Wilson"), by its attorney, hereby submits its reply to some of the comments submitted in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

Exemplifying the collaboration that the Commission envisioned in its *NPRM*, Wilson and Verizon Wireless submitted a detailed proposal ("Joint Proposal") calling for the imposition of stringent technical requirements on the manufacture of CMRS signal boosters.<sup>2</sup> Wilson remains firm in its belief that a properly-designed signal booster that complies with the specifications set forth in the *Consumer Booster Proposal* will not cause harm to wireless networks.

Having addressed the technical issues in this proceeding by the submission of the Joint Proposal, Wilson focused its initial comments on legal and regulatory matters that were material

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<sup>1</sup> See *Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, 26 FCC Rcd 5490 (2011) ("*NPRM*").

<sup>2</sup> See Letter from John T. Scott, III, Andre J. Lachance and Russell D. Lukas to Marlene H. Dortch, WT Docket No. 10-4 (July 25, 2011) ("Joint Letter"). The Joint Proposal is memorialized in two documents prepared by V-COMM, a wireless engineering consulting firm, which were appended to the Joint Letter. See Sean Haynberg & David Hunt, *Consumer Booster Specification for CMRS Spectrum Bands* (July 25, 2011) ("*Consumer Booster Proposal*"); Sean Haynberg & David Hunt, *Industry Certified Signal Booster Program* (July 25, 2011).

to the Commission's consideration and adoption of the Joint Proposal. Wilson will maintain that focus in the comments to follow.

Wilson will show that the jurisdiction-conferring provisions of the Communications Act of 1934, as amended ("Act"), clearly confer subject matter jurisdiction on the Commission to regulate and license signal boosters. Rulemaking authority to implement the Commission's proposed "license-by-rule framework"<sup>3</sup> is not only conveyed by § 307(e) of the Act as noted in the *NPRM*,<sup>4</sup> but by §§ 4(i) and 303(r) as well.<sup>5</sup> Considering that it may authorize the operation of radio stations without individual licenses by rule under §§ 4(i) and 303(r), the Commission's rulemaking authority is not limited by the ambiguous term "citizens band radio service" in § 307(e) and the Commission would be well within its authority if it made the reasonable policy choice to construe the term to encompass a signal booster radio service. That interpretation of § 307(e) would easily warrant judicial deference under *Chevron* step two.<sup>6</sup>

Verizon Wireless views the Joint Proposal as incompatible with the Commission's proposed licensing-by-rule framework, a view that Wilson does not share. Signal boosters are operated today under a blanket licensing scheme and licensee control. If it abandons licensing-by-rule under Part 95 in favor of blanket licensing under Parts 22, 24 and 27, the Commission will simply perpetuate the uncertainty and the endless disputes that prompted the issuance of the *NPRM* in the first place.

Wilson urges the Commission not to revisit its decision to refrain from issuing a declaratory ruling to dispense with the baseless claim that the sale or use of signal boosters

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<sup>3</sup> *NPRM*, 26 FCC Rcd at 5501 (¶ 29).

<sup>4</sup> *See id.* at 5502 (¶ 30).

<sup>5</sup> *See* 47 U.S.C. §§ 154(i), 303 & 307(e).

<sup>6</sup> *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

without licensee consent is unlawful. There has not been a single published Commission decision in the past thirty years that either held that the sale of a properly-certificated signal booster to an “unauthorized” subscriber was unlawful or imposed a forfeiture for a subscriber’s “unauthorized” use of a signal booster. Because nothing in the *NPRM* could have alerted interested parties that the Commission was considering a rule prohibiting the sale or use of signal boosters without licensee consent, the adoption of such a rule in this proceeding would violate the notice-and-comment requirements of the Administrative Procedure Act (“APA”).<sup>7</sup>

### ARGUMENT

#### I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO LICENSE THE USE OF CONSUMER SIGNAL BOOSTERS UNDER PART 95 OF THE RULES

Subject matter jurisdiction to regulate and license signal boosters was obviously conferred on the Commission by Title III of the Act,<sup>8</sup> particularly the jurisdiction-conferring provisions of §§ 301 and 303.<sup>9</sup> The Commission’s statutory authority to promulgate rules by which it will exercise its subject matter jurisdiction to regulate signal boosters is conveyed by §§

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<sup>7</sup> See 5 U.S.C. § 553.

<sup>8</sup> Subject matter jurisdiction refers to a “court’s statutory or constitutional *power* to adjudicate the case.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (emphasis in original). With respect to the Commission, subject matter jurisdiction refers to its statutory “power to regulate an activity.” *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565 n.32 (D.C. Cir. 1987) (“*ACLU*”), *cert. denied*, 485 U.S. 959 (1988).

<sup>9</sup>Beginning with cases such as *Kontrick v. Ryan*, 540 U.S. 443 (2004) and *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Supreme Court has curtailed “drive-by jurisdictional rulings” by federal courts that miss the differences between “true jurisdictional conditions and non-jurisdictional limitations on causes of action.” *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010). The Court has adopted a “readily administrable bright line” test to distinguish jurisdictional from non-jurisdictional statutory provisions, *Arbaugh*, 546 U.S. at 515, which essentially requires an examination of the text and structure of a statute to determine if Congress has clearly spoken to a court’s subject-matter jurisdiction (its “adjudicatory authority”). See *Reed Elsevier*, 130 S. Ct. at 1234-44. Similarly, the Commission’s subject matter jurisdiction must be conveyed by an “express statutory delegation of the authority” found in the Act. *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010). Clearly, Congress spoke directly to the “[p]owers” of the Commission in §303 of the Act.

4(i), 303(r) and 307(e).<sup>10</sup> The Commission recognized that § 307(e) authorized it to employ the “license-by-rule framework,” as the “best approach for enabling operation of properly certificated signal boosters.”<sup>11</sup>

As Wilson has shown, the Commission appears to have unbridled rulemaking authority under § 307(e)(3) to determine that a “signal booster radio service” would be equivalent to “citizens band radio service” as defined for the purposes of the license-by-rule framework of § 307(e).<sup>12</sup> In contrast, CTIA — The Wireless Association® (“CTIA”) and Wireless Communications Association International, Inc. (“WCAI”) strictly construe the provisions of § 307(e) to leave the Commission without authority to employ the license-by-rule approach to obviate the need to issue individual licenses to operate certificated signal boosters.<sup>13</sup> In particular, CTIA and WCAI attempt to limit the Commission’s rulemaking authority under § 307(e) to how they think Congress envisioned the “citizens band radio service” when it enacted § 307(e) in 1982.<sup>14</sup> Their efforts are to no avail insofar as § 307(e) may authorize the best framework for avoiding the need to individually license signal boosters, but it is not the only source of statutory authority to

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<sup>10</sup> See 47 U.S.C. §§ 154(i), 303(r) & 307(e)(1).

<sup>11</sup> *NPRM*, 26 FCC Rcd at 5501 (¶ 29).

<sup>12</sup> See Comments of Wilson Electronics, Inc., WT Docket No. 10-4, at 4-5 (July 25, 2011) (“Wilson Comments”).

<sup>13</sup> See Comments of CTIA — The Wireless Association®, WT Docket No. 10-4, at 9-11 (July 25, 2011) (“CTIA Comments”); WCAI, Comments, WT Docket No. 10-4, at 2-4 (July 25, 2011) (“WCAI Comments”).

<sup>14</sup> See CTIA Comments at 9 (“a signal booster service is fundamentally different from what Congress envisioned when it granted the Commission the power to authorize the operation of radio stations without individual licenses in the citizens band radio service”); WCAI Comments at 3 (a strict construction would limit § 307(e) “to those services the Commission had already defined as citizens band radio when the statute was enacted,” whereas a “more relaxed interpretation would provide the Commission with authority to designate new citizens band radio services, but only if they are substantially similar to those citizens band radio services that existed when the statute was enacted”).

accomplish the same goal.

Contrary to WCAI's assumption,<sup>15</sup> the Act does not mandate how the Commission must license the use and operation of "any apparatus for the transmission of energy or communications or signals by radio" under § 301.<sup>16</sup> Indeed, the Commission is afforded rulemaking authority to implement the statutory definition of the term "station license" or "license."<sup>17</sup> The Act also grants the Commission broad authority to adopt such rules and regulations that are necessary to execute its duty to issue licenses under § 301.

The first rulemaking-authority-conferring provision of the Act is § 4(i), which expressly empowers the Commission to "make such rules and regulations ... not inconsistent with [the Act], as may be necessary in the execution of its functions."<sup>18</sup> The comparable provision of Title III of the Act is § 303(r) which empowers the Commission to "[m]ake such rules and regulations ... not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."<sup>19</sup> The Commission's rulemaking authority under §§ 4(i) and 303(r), standing alone, is sufficient to

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<sup>15</sup> See WCAI Comments at 2 (The Commission proposes to avoid the "statutory scheme's licensing requirements").

<sup>16</sup> 47 U.S.C. § 301.

<sup>17</sup> The term is defined to mean the "instrument of authorization" required by the Act, or by the rules and regulations adopted by the Commission pursuant to the Act, "for the use and operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission." *Id.* § 153(42).

<sup>18</sup> *Id.* § 154(i). The heading of § 4(1) is "Duties and powers." The title of a statute or section "can aid in resolving an ambiguity in the legislation's text." *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959)). See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 441 & n.89 (5th Cir. 1999) (the "section heading enacted by Congress" is considered "in conjunction with the statutory text" to determine the provision's meaning). The heading of § 4(i) clearly speaks directly to the Commission's rulemaking power.

<sup>19</sup> 47 U.S.C. § 303(r). The heading of § 303 is "Powers and duties of the Commission."

authorize the adoption of the proposed Part 95 rules for a signal booster radio service.<sup>20</sup>

CTIA attaches inordinate significance to the Commission's decision to implement a CMRS "blanket licensing" regulatory scheme.<sup>21</sup> That scheme was implemented in 1980, when the Commission decided to abolish licensing of individual mobile units under Part 22.<sup>22</sup> Thus, the Commission exercised its rulemaking authority under §§ 4(i) and 303(r) to adopt a license-by-rule framework for the operation of most mobile stations under Part 22 *two years before* § 307(e) was enacted by Congress.<sup>23</sup> It is under that license-by-rule approach that subscribers operate mobile or fixed stations under Part 22 today, including mobile and fixed signal boosters.<sup>24</sup> Thus, it is clear that the Commission has the authority independent of § 307(e) to license signal boosters by rule.

The strict construction that CTIA and WCAI apply to § 307(e) is wholly inconsistent with the teaching of *Chevron*, which is recognized as one of the most important decisions in the history of administrative law.<sup>25</sup> The *Chevron* two-step test is applied to most agency constructions of agency-administered statutes.<sup>26</sup> The test can be applied in this case where the

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<sup>20</sup> See *NPRM*, 26 FCC Rcd at 5532-35.

<sup>21</sup> See CTIA Comments at 6-7.

<sup>22</sup> See *Amendment of Part 22 of the Rules to Modify Individual Licensing Procedures in the Public Mobile Services*, 77 F.C.C. 2d 84, 85-86 (1980) ("*Blanket Licensing Order*").

<sup>23</sup> The Commission also exercised its authority under §§ 4(i) and 303(r) in 1983, when it abolished individual licensing of subscriber units in the rural radio service for which the effective radiated power did not exceed 60 watts. See *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 F.C.C. 2d 769, 828-29, 832-33 (1983).

<sup>24</sup> See 47 C.F.R. §§ 22.3(b), 22.165, 22.377, 22.383, 22.517, 22.927.

<sup>25</sup> Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.2 at 110 (3rd ed. 1994).

<sup>26</sup> See *id.* at 109. Under *Chevron* step one, "if the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Under step two, "if the statute is silent or ambiguous with respect to the specific issue," the court must



Commission is implementing “authority indisputably delegated to it” by Congress, obviously because it already exercises its jurisdiction to license signal boosters.<sup>27</sup>

*Chevron* held that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts.”<sup>28</sup> “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>29</sup> As CTIA implicitly recognizes, § 307(e) is ambiguous with respect to the term “citizens band radio service” in subsections (e)(1) and (e)(2).<sup>30</sup>

Both under *Chevron* and the plain meaning of § 307(e)(3), the Commission has been delegated the authority to fill the gap in subsection (e)(3) by defining the term “citizens band radio service” in a reasonable fashion. Considering that it may “authorize the operation of radio stations without individual licenses”<sup>31</sup> by rule under §§ 4(i) and 303(r), the Commission would be well within its authority if it made the reasonable policy choice that, to include a “Signal Booster Radio Service” as among the Citizens Band Radio Services” under § 95.401 of the

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determine “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

<sup>27</sup> *ACLU*, 823 F.2d at 1565 n.32. It may be otherwise “[w]here the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation).” *Id.* In such cases, “it seems unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.” *Id.*

<sup>28</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66).

<sup>29</sup> *Id.* (citing *Chevron*, 467 U.S. at 843-44).

<sup>30</sup> See CTIA Comments at 9 & n.26 (quoting *Chevron*, 467 U.S. at 843).

<sup>31</sup> 47 U.S.C. § 307(e)(1).

Rules,<sup>32</sup> would be the best approach to “facilitate operation of signal boosters to enhance wireless coverage and access to broadband services, while minimizing administrative costs and burdens on the public.”<sup>33</sup> That interpretation of § 307(e) would easily warrant judicial deference under *Chevron* step two.

## II. THE JOINT PROPOSAL DOES NOT ENVISION THAT CONSUMER BOOSTERS WILL BE OPERATED UNDER CARRIER LICENSES

As previously disclosed, Wilson’s willingness to join with Verizon Wireless in proposing stringent rules for the design, installation and use of signal boosters<sup>34</sup> was premised on the Commission’s adoption of the § 307(e) licensing scheme proposed in the *NPRM*.<sup>35</sup> A critical consideration for Wilson was that the use of Consumer Boosters, as opposed to Certified Engineered and Operated Boosters and Carrier Installed Boosters, not be authorized under a blanket licensing scheme that would subject a subscriber’s use of a properly-certificated Consumer Booster to the control of the licensed service provider.<sup>36</sup> In contrast, Verizon Wireless opposes the Commission’s proposal to license subscribers by Part 95 rules to operate signal boosters.<sup>37</sup> It suggests that the Joint Proposal was designed to ensure that Consumer Boosters

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<sup>32</sup> See *NPRM*, 26 FCC Rcd at 5531-32 (proposed § 95.401(h)).

<sup>33</sup> *Id.* at 5501.

<sup>34</sup> See Letter from John T. Scott, III, Andre J. Lachance and Russell D. Lukas to Marlene H. Dortch, WT Docket No. 10-4 (July 25, 2011) (“Joint Letter”). The agreement between Wilson and Verizon Wireless is memorialized in two documents (the “Joint Proposal”) prepared by V-COMM, a wireless engineering consulting firm, which are appended to the Joint Letter. See Sean Haynberg & David Hunt, *Consumer Booster Specification for CMRS Spectrum Bands* (July 25, 2011) (“*Consumer Booster Proposal*”); Sean Haynberg & David Hunt, *Industry Certified Signal Booster Program* (July 25, 2011).

<sup>35</sup> See Wilson Comments at 7.

<sup>36</sup> See *id.*

<sup>37</sup> See Comments of Verizon Wireless, WT Docket No. 10-4, at v (July 25, 2011) (“Verizon Wireless Comments”)

“operate with the licensee’s knowledge, under the licensee’s control.”<sup>38</sup> That clearly was not Wilson’s understanding.

It appears that Verizon Wireless construed the Joint Proposal as incompatible with licensing-by-rule under Part 95 based on the statement in the *Consumer Booster Proposal* that such boosters “will be licensed under Part 22 (Cellular), Part 24 (Broadband PCS) and Part 27 (AWS & 700 MHz),” whereas “Part 90 (PLMR) bands are excluded at this time, and recommended for future consideration after 800 MHz re-banding has completed.”<sup>39</sup> Wilson took that statement to refer to the scope of the Joint Proposal and to reflect the fact that the proposed specifications for Consumer Boosters were intended to be “technology neutral and provide protection to all CMRS network technologies ... that are used on Cellular, PCS, AWS and 700 MHz commercial mobile radio frequency bands.”<sup>40</sup> Wilson did not understand the reference to licensing Consumer Boosters under Parts 22, 24 and 27 to be a regulatory requirement that the parties agreed to support.<sup>41</sup>

In any event, § 307(e)(2) provides that “[a]ny radio station operator who is authorized by the Commission to operate without an individual license shall comply with all other provisions of [the Act] and with rules prescribed by the Commission under [the Act].”<sup>42</sup> Accordingly, under the Commission’s proposal, subscribers will be authorized to operate properly-certificated

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<sup>38</sup> Verizon Wireless Comments at 18.

<sup>39</sup> *Consumer Booster Proposal* at 1.

<sup>40</sup> Joint Letter at 2.

<sup>41</sup> Wilson believed that the Joint Proposal was intended primarily to propose technical specifications for the design of Consumer Boosters that will protect wireless networks from interference. It did not think that the Joint Proposal was to address regulatory issues or to proposed a regulatory approach inconsistent with the Commission’s proposal in the *NPRM*. To the best of Wilson’s knowledge, no attorney took part in the discussions that led to the adoption of the Joint Proposal.

<sup>42</sup> 47 U.S.C. § 307(e)(2).

Consumer Boosters under Part 95, but their use of the boosters will be on a secondary, non-interference basis to the “primary services licensed for the frequency bands on which they transmit.”<sup>43</sup> Moreover, subscribers that operate Consumer Boosters will have to comply not only with the applicable Part 95 rules, but also with all the rules applicable to the frequency bands on which they operate. Thus, operators of Consumer Boosters will be subject either to the Part 22 rules applicable to cellular,<sup>44</sup> the Part 24 rules applicable to Broadband PCS,<sup>45</sup> or the Part 27 rules that apply to AWS and 700 MHz service.<sup>46</sup> In that sense, the operation of Consumer Boosters will be subject to, but not licensed under, Parts 22, 24 and 27.

Wilson urges the Commission not to license the use of Consumer Boosters under Parts 22, 24 and 27. Wilson agreed to the stringent technical requirements set forth in the *Consumer Booster Proposal* to so minimize the potential for harmful interference as to obviate the need for licensee control. As New American Foundation recently informed the Commission:

In our comments, New America and Public Knowledge concurred with Wilson’s view that subject to the Commission’s strict device certification rules aimed at avoiding harmful interference to carrier services, any consumer should be able to purchase and operate a compliant, carrier-agnostic signal booster unfettered by the incumbent licensee, particularly since the carrier’s only legitimate interest and right is to operate without undue risk of harmful interference.<sup>47</sup>

Signal boosters are operated today under a blanket licensing scheme and licensee control and the scheme obviously has not worked well from any standpoint. If it abandons its proposed licensed-by-rule approach in favor of blanket licensing under Parts 22, 24 and 27, the Commission will simply perpetuate the uncertainty and the disputes that prompted the issuance

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<sup>43</sup> *NPRM*, 26 FCC Rcd at 5533 (proposed § 95.1615).

<sup>44</sup> *See id.* at 5529 (proposed § 22.9).

<sup>45</sup> *See id.* at 5530 (proposed § 24.9).

<sup>46</sup> *See id.* (proposed § 27.9).

<sup>47</sup> Letter from Michael Calabrese to Marlene Dortch, WT Docket No. 10-4, at 3 (Aug. 12, 2011).

of the *NPRM* in the first place. In short, the adoption of the Commission’s proposed regulatory framework should put an end to such needless contentiousness as exemplified by CTIA in this proceeding. We turn CTIA’s repetitive arguments next.

### III. THE LEGALITY OF THE SALE AND USE OF SIGNAL BOOSTERS WITHOUT LICENSEE PERMISSION IS NOT AT ISSUE IN THIS RULEMAKING

#### A. CTIA Repeats Its Requests for Declaratory Relief that the Commission Implicitly Rejected by Issuing the *NPRM*

In November 2007, CTIA petitioned the Commission to issue a declaratory ruling “to clarify that the sale or use of signal boosters without appropriate CMRS licensee consent is unlawful.”<sup>48</sup> CTIA’s petition was a subject of the notice-and-comment proceeding that led to the issuance of the *NPRM*.<sup>49</sup> Until the eve of the Sunshine Period in that proceeding, CTIA continued to advocate that the Commission issue the declaratory ruling outlawing the sale and use of signal boosters without licensee consent.<sup>50</sup>

Despite the pendency of the CTIA Petition, CTIA’s comments include a request for the same declaratory relief it first sought in November 2007. CTIA requests that the Commission: (1) “affirm that a license or licensee consent is required to operate a signal booster;”<sup>51</sup> and (2) “clarify that the sale of boosters to unauthorized parties is illegal.”<sup>52</sup> Moreover, CTIA expresses

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<sup>48</sup> *Wireless Telecommunications Bureau Seeks Comment on Petitions Regarding the Use of Signal Boosters and Other Signal Amplification Techniques Used with Wireless Services*, 26 FCC Rcd 68, 69 (WTB 2010) (“*Signal Booster PN*”). See also Petition for Declaratory Ruling of CTIA — The Wireless Association®, WT Docket No. 10-4 (Nov. 2, 2007) (“CTIA Petition”).

<sup>49</sup> See *Signal Booster PN*, 26 FCC Rcd at 68.

<sup>50</sup> See Letter from Brian M. Josef to Marlene H. Dortch, WT Docket No. 10-4, at 1 (Feb. 23, 2011); Letters from Brian M. Josef to Marlene H. Dortch, WT Docket No. 10-4, at 1 (Dec. 8, 2010); Letter from Brian M. Josef to Marlene H. Dortch, WT Docket No. 10-4, at 1 (Nov. 22, 2010); Letter from Brian M. Josef to Marlene H. Dortch, WT Docket No. 10-4, at 1 (June 3, 2010).

<sup>51</sup> CTIA Comments at 2. See CTIA Petition at 12.

<sup>52</sup> Compare CTIA Comments at 2 with CTIA Petition at 2, 11.

the same concerns and essentially repeats the arguments it made to the Commission prior to the release of the *NPRM*.<sup>53</sup>

B. The Commission Can Pass on CTIA's Requests for Declaratory Relief and Dismiss the CTIA Petition as Moot

If CTIA had established that the declaratory relief it requested in 2007 would terminate a controversy, remove uncertainty,<sup>54</sup> and would not entail a rule change requiring compliance with the APA's notice-and-comment requirements,<sup>55</sup> the Commission would have disposed of the CTIA Petition in the *NPRM* or in conjunction with the *NPRM*. By electing not to act on the CTIA Petition, the Commission found that it could not issue the declaratory ruling that CTIA seeks without interim rule changes. Now that CTIA has reasserted its requests for declaratory relief in this rulemaking, the Commission can dispense with CTIA's claims and dismiss the CTIA Petition as moot in its order terminating this proceeding.

C. The Rules Do Not Prohibit the Operation of Signal Boosters Without a License or Licensee Consent

Once again, CTIA beseeches the Commission to "affirm and enforce its rules that prohibit the operation of signal boosters without a license or FCC licensee consent."<sup>56</sup> However, once again, CTIA fails to cite a single rule that explicitly provides that a subscriber in good standing cannot operate a signal booster without a license or licensee consent. Instead, CTIA construes various wireless rules in light of what it claims is a Commission-developed "CMRS

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<sup>53</sup> Compare CTIA Comments at 2-14 with CTIA Petition at 10-14, Comments of CTIA — The Wireless Association®, WT Docket No. 10-4, at 12-22 (Feb. 5, 2010) ("CTIA *Signal Booster PN* Comments").

<sup>54</sup> See 47 C.F.R. § 1.2.

<sup>55</sup> See 5 U.S.C. § 553. The Commission denied the petition for declaratory ruling filed by Jack Daniel, because his "requests for clarification are in fact requests for rule changes." *NPRM*, 26 FCC Rcd at 5499 n.42. Accordingly, the Commission solicited comments on Mr. Daniel's proposals in this proceeding. See *id.*

<sup>56</sup> CTIA Comments at 6.

regulatory regime” that allegedly is “focused on exclusive-use licensing and licensee control.”<sup>57</sup>

And it proffers four bullet points to wireless rules to “reinforce the conclusion that ‘blanket’ licensing under these rules does not extend to signal boosters.”<sup>58</sup> There is an obvious rejoinder to each one of CTIA’s bullet points:

- *Part 1 states that stations in the wireless radio services must be used and operated in accordance with the rules applicable to their service and may not be operated without a valid authorization.*<sup>59</sup> Part 1 also provides that the “[a]uthority for subscribers to operate mobile or fixed stations in the Wireless Radio Services ... is included in the authorization held by the licensee providing service to them.”<sup>60</sup> It also provides that the Commission “does not accept ... applications from subscribers for individual mobile or fixed station authorizations” in such services.<sup>61</sup>
- *Part 22 explains that a subscriber’s authority to operate a handset on licensed spectrum stems directly from the “authorization held by the licensee providing service to them.”*<sup>62</sup> Part 22 actually provides that the “[a]uthority for subscribers to operate mobile or fixed stations in the Public Mobile Services... is included in the authorization held by the licensee providing service to them.”<sup>63</sup> It also provides that the Commission “does not accept ... applications from subscribers for individual mobile or fixed station authorizations” in such services.<sup>64</sup> Furthermore, Part 22 states that “[m]obile stations that are subscribers in good standing to a [Public Mobile Service], when receiving service from that station [or system], are considered to be operating under the authorization of that station [or system].”<sup>65</sup>
- *Part 22 further provides [at § 22.165] that “[a] licensee may operate additional transmitters at additional locations on the same channel or channel block as its existing system without obtaining prior Commission approval,” if*

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<sup>57</sup> CTIA Comments at 6.

<sup>58</sup> *Id.* at 7.

<sup>59</sup> *Id.* at 6 (citing 47 C.F.R. § 1.903) (emphasis added).

<sup>60</sup> 47 C.F.R. § 1.903(c).

<sup>61</sup> *Id.*

<sup>62</sup> CTIA Comments at 6 (citing 47 C.F.R. § 22.3) (emphasis added).

<sup>63</sup> 47 C.F.R. § 22.3(b).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* §§ 22.571 & 22.927.

*certain conditions are met.*<sup>66</sup> Under Part 22, “[l]icensees may install and operate signal boosters ... only in accordance with the provisions of § 22.165 governing additional transmitters for existing systems.”<sup>67</sup> In addition, Part 22 provides that “[l]icensees may install and operate in-building radiation system without applying for authorizations or notifying the FCC, provided that the locations of the ... systems are within the protected service area of the licensee’s authorized transmitter(s) on the same channel or channel block.”<sup>68</sup> Finally, Part 22 also states that “transmitters used in the Public Mobile Services, including those used with signal boosters, in-building radiation systems and cellular repeaters, must be certificated [under Part 2] for use in the radio services regulated under [Part 22].”<sup>69</sup>

- *Part 24 contains another similar provision, stating that blanket licenses will be granted, but applications for individual sites will not be accepted.*<sup>70</sup> However, Part 24 Personal Communications Services (“PCS”) are Wireless Radio Services<sup>71</sup> and the Part 24 rules must give way to the rules set forth in Subpart F of Part 1.<sup>72</sup> Therefore, the “[a]uthority for subscribers to operate mobile or fixed stations in the [PCS] ... is included in the authorization held by the licensee providing service to them.”<sup>73</sup>

When read in context of other applicable Parts 1 and 22 rules, nothing in the CTIA bullet points can be considered a properly-promulgated rule that explicitly provides that, despite the language of §§ 1.903(c) and 22.3(b) authorizing subscribers to operate their own fixed and mobile stations, a subscriber in good standing cannot operate a signal booster under the authorization held by the licensee without the licensee’s consent. As CTIA acknowledges, the Commission had the opportunity to adopt such a rule with respect to in-building radiation

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<sup>66</sup>CTIA Comments at 7 (citing 47 C.F.R. § 22.165) (emphasis added).

<sup>67</sup> 47 C.F.R. § 22.527.

<sup>68</sup> *Id.* § 22.383.

<sup>69</sup> *Id.* § 22.377.

<sup>70</sup> CTIA Comments at 4 (citing 47 C.F.R. § 24.11(b)) (emphasis added).

<sup>71</sup> *See* 47 C.F.R. § 1.901.

<sup>72</sup> *See id.* § 1.902.

<sup>73</sup> *Id.* § 1.903(c).



systems in 2005.<sup>74</sup> However, the Commission declined to do so, opting instead to wait for its staff to complete an examination of “a set of issues related to the appropriate regulatory treatment of wireless boosters used to improve or facilitate service in a number of areas, including buildings.”<sup>75</sup> The policy statement that the Commission announced in the next breath after declining to adopt a rule was just that — an unenforceable policy statement.<sup>76</sup>

CTIA dredges up five unpublished “enforcement actions,” all of which were first cited by AT&T in February 2010, in an attempt to show that “the unauthorized operation of signal boosters is impermissible under Commission rules.”<sup>77</sup> *Au contraire*, not one of the five notices cited by CTIA: (1) identified a specific rule that an operator of a signal booster allegedly violated;<sup>78</sup> (2) constituted a final determination that the operation of a signal booster violated any rule; or (3) can be cited as precedent under § 0.445(e) of the Rules.<sup>79</sup>

CTIA does cite to the published notice of apparent liability for forfeiture (“NALF”) that the Spectrum Enforcement Division (“Division”) issued to Digital Antenna, Inc. (“Digital Antenna”) in May 2008.<sup>80</sup> Wilson has distinguished the *Digital Antenna* NALF at least three

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<sup>74</sup> See CTIA Comments at 7-8 & n.20 (citing *Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services*, 20 FCC Rcd 4403, 4454 (2005) (“*Air-Ground Order*”).

<sup>75</sup> *Air-Ground Order*, 20 FCC Rcd at 4454.

<sup>76</sup> See Reply Comments of Wilson Electronics, Inc., WT Docket No. 10-4, at 13-16 (Mar. 8, 2010) (“Wilson Reply Comments”); Letter from Russell D. Lukas to P. Michele Ellison, WT Docket No. 10-4, at 10-12 (Apr. 6, 2010) (“Wilson Letter”).

<sup>77</sup> Compare CTIA Comments at 8-9 & n.24 with Letter from M. Robert Sutherland to P. Michele Ellison, WT Docket No. 10-4, at 3-5 & nn.7-9 (Feb. 2, 2010) and CTIA *Signal Booster PN* Comments at 15-16 & n.50.

<sup>78</sup> See CTIA Comments at 9 n.24.

<sup>79</sup> See Wilson Reply Comments at 11-12; Wilson Letter at 12-13.

<sup>80</sup> See CTIA Comments at 8 & n.22 (citing *Digital Antenna, Inc.*, 23 FCC Rcd 7600 (Spectrum Enf. Div. 2008)).

times already.<sup>81</sup> Suffice it to say that the Division did not notify Digital Antenna of its apparent liability for forfeiture relating to any operation of a signal booster in violation of any identified rule. Moreover, Wilson understands that Digital Antenna has yet to pay the \$11,000 forfeiture sought by the Division, no forfeiture order has been issued by the Commission, and no court has ordered Digital Antenna to pay a forfeiture. If so, the *Digital Antenna* NALF cannot be treated as precedent supporting CTIA's requests for declaratory relief.<sup>82</sup>

According to CTIA, the rules have prohibited the operation of signal boosters without licensee consent since the Commission implemented a CMRS "blanket licensing" regulatory scheme.<sup>83</sup> Because that scheme was implemented in 1980,<sup>84</sup> CTIA contends that signal boosters have been operated unlawfully for over thirty years during which time the "ongoing illicit use of unauthorized signal boosters cause significant interference to wireless networks." It is telling, therefore, that CTIA cannot cite to a single Commission decision, published in the last thirty years, that imposed a forfeiture for the unauthorized use of a signal booster in violation of a Rule. CTIA can find no such decision because there is no such rule.

D. The Act and the Rules Do Not Prohibit the Sale of Properly-Certificated Signal Boosters to Subscribers of Wireless Radio Services

CTIA clearly overreached when it first requested a declaratory ruling that would make it unlawful under § 302(b) of the Communications Act of 1934, as amended ("Act"), and §§ 22.377 and 24.51 of the Rules, to sell or market a signal booster to an unauthorized wireless

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<sup>81</sup> See Wilson, Petition for Rulemaking, WC Docket No. 10-4, Attachment 3 at 10 (Nov. 3, 2009); Wilson Reply Comments at 12-13; Wilson Letter at 13.

<sup>82</sup> The Commission is statutorily barred from using the fact that a NALF was issued to Digital Antenna to its detriment in this proceeding by citing *Digital Antenna* as precedent for issuing the rulings sought by CTIA. See 47 U.S.C. § 504(c).

<sup>83</sup> See CTIA Comments at 6-7.

<sup>84</sup> See *Blanket Licensing Order*, 77 F.C.C. 2d at 85-86.

subscriber.<sup>85</sup> It became disturbing that CTIA subsequently claimed that § 302(b) of the Act and some unspecified CMRS regulations compelled the Commission to issue such a declaratory ruling.<sup>86</sup> The Commission must question whether CTIA is proceeding in good faith now that it has not only pressed its baseless claim for the third time,<sup>87</sup> but did so on the heels of citing the Division's 2004 letter to TX RX Systems, Inc.,<sup>88</sup> which is part of Bird Technologies Group ("Bird").<sup>89</sup> In that letter, the Division stated:

This letter is in response to your fax transmission of May 25, 2004 and attached letter dated March 17, 2004. The ... Division ... has reviewed your complaint concerning the direct marketing of signal boosters and in-building radiation systems to commercial mobile radio subscribers and found no evidence of a violation. While it is correct that these devices may only be installed and operated by licensees, the Commission's Rules do not explicitly prohibit the sale of such devices to non-licensees. Accordingly, we find that further investigation is not warranted at this time.<sup>90</sup>

The Act provides no authorization for the ruling CTIA persists in seeking. Section 302(b) provides that "[n]o person shall manufacture, import, sell, offer for sale, or ship devices ... or use devices, which fail to comply with regulations promulgated pursuant to this section."<sup>91</sup> The Commission is empowered by § 302(a) to "make reasonable regulations ... governing the interference potential of devices which in their operation are capable of ... [causing] harmful

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<sup>85</sup> See CTIA Petition, Attachment 1 at 9-11.

<sup>86</sup> See CTIA *Signal Booster PN* Comments at 18.

<sup>87</sup> CTIA asks the Commission to "clarify" that the sale and marketing of signal boosters to subscribers that are not authorized by their licensed service providers to use the devices violate rules promulgated under § 302(a) of the Act and contravene § 302(b). See CTIA Comments at 12.

<sup>88</sup> See *id.* at 8-9 & n.23 (citing Letter from Joseph P. Casey to Ronald Jakubowski (June 28, 2004) ("Division Letter").

<sup>89</sup> See Bird, Petition for Rulemaking, WT Docket No. 10-4, at 1 (Aug. 18, 2005).

<sup>90</sup> Division Letter at 1. A copy of the Division Letter is provided as Attachment 1 hereto.

<sup>91</sup> 47 U.S.C. § 302(a).

interference to radio communications.”<sup>92</sup> Regulations adopted by the Commission pursuant to § 302(a) must be applicable to (1) the “manufacture, import, sale, offer for sale, or shipment of such devices,” and (2) the “use of such devices.”<sup>93</sup>

The Commission exercised its authority under § 302(a) by adopting § 2.803(a)(1) of the Rules, which provides that “no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless in the case of a device subject to certification such device has been authorized by the Commission.”<sup>94</sup> Consequently, under § 302(b) of the Act and the Commission’s current rules, it is unlawful to “manufacture, import, sell, offer for sale, or ship” signal boosters that are subject to certification under Part 2 of the Rules, but have not been so authorized by the Commission. If a signal booster has been properly certificated by the Commission for use in a Wireless Radio Services, the device can be sold to a non-licensee irrespective of whether the licensee consented to the sale or thinks that the device is capable of causing interference.

There has been no material change in the Part 2, 22 or 24 rules since 2004, when the Division found the sale of certificated signal boosters to non-licensees is not prohibited under the Rules.<sup>95</sup> Since no rule currently prohibits the sale of signal boosters to so-called “unauthorized” subscribers, the Commission has nothing to “clarify” that would prohibit such sales. Moreover, nothing in the *NPRM* could alert interested parties that the Commission was considering

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<sup>92</sup> 47 U.S.C. § 302(a)(1).

<sup>93</sup> *Id.* § 302(a)(2).

<sup>94</sup> 47 C.F.R. § 2.803(a)(1).

<sup>95</sup> *See infra* Attachment 1.

adopting a rule to prohibit the manufacture and sale of signal boosters,<sup>96</sup> instead of adopting a new regulatory framework that will encourage carriers and manufacturers to collaboratively develop “consumer signal boosters” that will improve subscribers’ wireless network coverage without harming wireless networks.<sup>97</sup> Consequently, if it was inclined to adopt such a prohibition, the Commission would be required by the APA, as well as by §§ 1.412(a) and 1.413(c) of the Rules, to issue a new notice of proposed rulemaking that includes the terms and substance of the proposed prohibition and have it published in the Federal Register.<sup>98</sup>

E. CTIA’s Attempts to Impede Wilson’s Marketing Efforts Demonstrate the Need for the Commission’s New Regulatory Framework to Ensure that Consumers Have Access to Well-Designed Signal Boosters

CTIA has never been able to cite to a single Commission decision that held that the sale and/or marketing of signal boosters is limited by the Commission’s rules to licensees or those authorized by licensees to operate such equipment. And CTIA has had the Division Letter in its possession at least since February 5, 2010.<sup>99</sup> Since that date CTIA is charged with knowledge of the Division’s opinion that the Commission’s rules do not prohibit the sale of signal boosters to non-licensees. Nevertheless, CTIA has repeatedly asserted the alleged prohibition as the pretext to interfere with Wilson’s efforts to market and sell its certificated signal boosters.

On March 16, 2010, CTIA notified Wilson that its entry in the CTIA 2010 Emerging Technology Awards Program was rejected for the following reason:

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<sup>96</sup> Therefore, a rule prohibiting the manufacture and sale of signal boosters to unauthorized subscribers could not be considered a “logical outgrowth” of the rules proposed by the *NPRM*. See, e.g., *Sprint Corp. v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003). Adoption of such a prohibition in this proceeding would violate the notice-and-comment requirements of the APA. See *id.* at 377.

<sup>97</sup> See *NPRM*, 26 FCC Rcd at 5491 (¶¶ 2, 3).

<sup>98</sup> See 5 U.S.C. § 553(b)(3); 47 C.F.R. §§ 1.412(a) & 1.413(c).

<sup>99</sup> See *CTIA Signal Booster PN Comments* at 16 n.49.

[Y]our submission appears to involve the marketing, sale or offer for sale of equipment intended to amplify [CMRS] device signals or extend the coverage area of CMRS providers, including any or all manner of amplifiers, repeaters, or boosters, to parties who may not be licensees or authorized by licensees to operate such equipment. Accordingly, CTIA will not accept this submission for entry in our awards program or display your entry at the E-Tech showcase at the International CTIA Wireless 2010 Show.<sup>100</sup>

On February 25, 2011, after thanking Wilson for its participation as an exhibitor at the International CTIA Wireless 2011 show, CTIA informed Wilson of the following:

While CTIA, as the Show Management, is looking forward to your participation at our show, any display of amplifiers, repeaters, boosters, distributed antenna systems, and in-building radiation systems (“signal boosters”) that serve to amplify CMRS device signals, Part 90 signals, or extend the coverage area of CMRS providers or Part 90 service licensees at the International CTIA WIRELESS<sup>®</sup> 2011 show will only be deemed suitable to or in keeping with the character or purpose of the show if they are displayed with a clear and conspicuous disclosure at your Exhibit Booth informing visitors that the sale and/or marketing of your company’s signal boosters is limited to licensees, or those authorized by licensees to operate such equipment, as required by the FCC’s rules.

To ensure that you have the appropriate disclosure on site, CTIA will provide signage for display in your booth, *i.e.*, “*The sale and/or marketing of Wilson Electronics’s signal boosters is limited to licensees, or those authorized by licensees to operate such equipment, as required by the FCC’s rules.*” Please be advised that if you display signal boosters, the sign must be conspicuously displayed at all times in your booth while the Exhibit Floor is open.<sup>101</sup>

Finally, after CTIA mass-mailed a brochure that promised attendees at upcoming CTIA shows that Wilson will be among the “industry leaders” that they will see,<sup>102</sup> Wilson was notified by CTIA on August 11, 2011, that its position remains the same and that it would not offer Wilson “the opportunity to take advantage of a CTIA sponsored email blast or any other

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<sup>100</sup> See *infra* Attachment 2 (Letter from Robert B. Mesirow to Jon Bacon (Mar. 16, 2010)).

<sup>101</sup> See *infra* Attachment 3 (Letter from Robert B. Mesirow to Mark Evans (Feb. 25, 2011)).

<sup>102</sup> See *infra* Attachment 4.

sponsorship.”<sup>103</sup>

CTIA’s statement that the sale or marketing of Wilson’s signal boosters was limited by the Commission’s rules to licensees or those authorized by licensees was, at best, unwarranted under current law and, at worst, an intentional misrepresentation of law. In either case, CTIA’s willingness to use a false legal pretext to impede consumers from having access to Wilson’s well-designed signal boosters demonstrates the need for the Commission to expedite the adoption of its proposed new regulatory framework for signal boosters. Until the new rules are in place, CTIA — and several of its members — will continue to ignore the reality revealed by the *NPRM* and to hamper Wilson’s ability to market signal boosters that can provide Commission-recognized public benefits.

#### IV. THE COMMISSION SHOULD NOT IMPOSE UNNECESSARY OR IMPRACTICAL REQUIREMENTS ON CONSUMER BOOSTERS

The Commission should not require so-called “carrier specific operation” of Consumer Boosters.<sup>104</sup> Consumer Boosters must be able to operate over the full range of cellular, broadband PCS, AWS and 700 MHz service spectrum in order to be useful to consumers. If they are limited to carrier-specific frequencies, or subjected to frequency co-ordination,<sup>105</sup> Consumer Boosters will not be useful for vehicular use as they would not be able to roam. In addition, the inability to roam would put life and property in jeopardy since it will limit the usefulness of

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<sup>103</sup> See *infra* Attachment 5 (Email from Geoff Dye to Jonathon Bacon (Aug. 11, 2011)).

<sup>104</sup> T-Mobile USA, Inc. Comments, WT Docket No. 10-4, at 10 (July 25, 2011) (“T-Mobile Comments”). See CTIA Comments at 15.

<sup>105</sup> The specifications set forth in the *Consumer Booster Proposal* are designed to minimize any noise floor increases and to prevent any uplink signal overload of a cell site’s receivers. Therefore, carrier co-ordination is unnecessary and burdensome to consumers. Moreover, carrier co-ordination is impossible with respect to mobile Consumer Boosters.

boosters in public safety applications. It should be noted that over 2,000 government and public safety agencies presently employ boosters in their emergency and patrol vehicles.

The Commission should not require that Consumer Boosters have remote shut-down capabilities.<sup>106</sup> Signal boosters that incorporate the safeguards required under the *Consumer Booster Proposal* do not require such capabilities. The proposed safeguards provide for self-monitoring and shut-down techniques that are triggered when the device detects a condition which could cause interference to a cell sites. Remote shut-down capability unnecessarily increases the price of a Consumer Booster making it unaffordable to many consumers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell Lukas", with a stylized, flowing script.

Russell D. Lukas  
LUKAS, NACE, GUTIERREZ & SACHS, LLP  
8300 Greensboro Drive, Suite 1200  
McLean, Virginia 22102  
(703) 584-8678  
[rlukas@fcclaw.com](mailto:rlukas@fcclaw.com)  
*Attorney for Wilson Electronics, Inc.*

August 24, 2011

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<sup>106</sup> See T-Mobile Comments at 12.